No. 92-1106

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRIKO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether A Court May Exercise Its In Rem Jurisdiction To Decide the Merits Of A Party's Claim To A Res When The Court Never Had Jurisdiction Over The Res Itself.

II. Whether A Closely Held Foreign Corporation That Owns Investment Accounts In Its Name Has Standing To Assert A Claim When Those Funds Are Seized And One Principal Of The Corporation Has Been Alleged By The Government To Control The Corporation.

LIST OF PARTIES

The parties that have appeared in this case include those listed on the case caption. As this is a Government initiated forfeiture action, the parties below also included, as named defendants, the Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner & Smith, Inc.

Friko Corporation has no parent companies or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, FRIKO CORPORATION, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit. In the alternative, an Order should be issued vacating the Third Circuit's decision and ordering reconsideration in light of *National Republic Bank of Miami v. United States*, decided last week by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix A) is reported in 971 F.2d 974. The opinion of the District Court below (Appendix B) was not reported.

JURISDICTION

The Third Circuit Court of Appeals issued its opinion on July 22, 1992. It denied a petition for rehearing on September 22, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C., Supplemental Rule of Civil Procedure C(2), in relevant part:

> In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with particularity the property that is the subject of the action and state that it is within the district or will be during the pendency, of the action.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

The Government brought this civil forfeiture case in New Jersey pursuant to 18 U.S.C. 981(a)(1), invoking the rules of admiralty codified in the Supplemental Rules of Civil Procedure. Friko Corporation (Friko) filed a claim under Rule C(6), and, among other things, moved to dismiss the case because the *res* was not located in New Jersey. The District Court rejected Friko's jurisdictional objection, and then struck its claim on the basis that Friko did not have standing.[1]

Appellate jurisdiction was invoked pursuant to 18 U.S.C. 1291.

B. RELEVANT FACTS

The District Court struck Friko's claim based on affidavits and accompanying documents. No testimony was taken. The following summary represents the Third Circuit's view of the evidence.

Friko Corporation was incorporated under Colombian law on September 25, 1980. Its principal directors and officers were Johnny Daccarett, Jorge Daccarett, and Judith Daccarett. In 1981, Joseph Daccarett replaced Judith as corporate treasurer. Friko presented itself as a money exchanger on Colombia's parallel market. The Government charged that its investigation uncovered no business activities for Friko except a series of financial transactions.

On October 17, 1983, Friko opened two accounts with Merrill, Lynch, Pierce, Fenner & Smith. A corporate resolution signed on February 22, 1983 by Friko's secretary, Jorge Daccarett, authorized Johnny Daccarett and Delia Daccarett to buy, sell, borrow and otherwise obligate the corporation on the accounts.

In 1987, Friko loaned a man named Luis Saad $41,000 from funds withdrawn out of the Merrill, Lynch accounts. Saad used the funds to open an account in 1988 with Bank Leumi Trust Company in New York. Saad claimed that he purchased textiles with the money

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1. Friko also filed a motion to reconsider the District Court's ruling, which the District Court denied. Friko appealed from that order, and the Third Circuit reversed, ordering the District Court to decide whether additional information provided by Friko could be considered to establish the company's standing.

and eventually repaid Friko. Neither the loaned funds, nor the accounts, passed through the State of New Jersey.

In 1990, the Government filed a criminal indictment in New Jersey charging numerous parties in a criminal money laundering conspiracy that allegedly originated in 1989. The Government alleged that Saad, Friko, Johnny Daccarett, and Quasil, a Panamanian company owned by Daccarett, had connections to this conspiracy. According to the Government, substantial sums of money had passed between Quasil and Friko during the period of the conspiracy, and over an eight month period over $200,000 had been deposited in the Quasil account. The indictment included Friko and Daccarett as named defendants.

Johnny Daccarett authorized an appearance to be filed on Friko's behalf, but he did not volunteer to come to this country to defend himself personally. Shortly thereafter, the Government dismissed the charges against Friko and declared Johnny Daccarett a fugitive. Then, in March, 1990, the Government seized the Merrill, Lynch accounts in New York City, and filed a civil forfeiture complaint in New Jersey. At the time, the accounts contained nearly $2,000,000.

The Government described the Merrill, Lynch accounts as assets of Friko. Accordingly, pursuant to a corporate resolution signed by Johnny Daccarett, Friko made a claim under Rule C(6) of the Supplemental Federal Rules of Civil Procedure for the funds. Friko contended, however, that the District Court of New Jersey lacked jurisdiction over a *res* not located in New Jersey.

The District Court struck Friko's claim, accepting the Government's contention that Friko was a "straw man" for Johnny Daccarett and had no standing to claim the funds. The Third Circuit Court of Appeals agreed. The court held further that while the District Court lacked jurisdiction over the *res*, it could nevertheless adjudicate the merits of Friko's claim, because Friko had subjected itself to the court's *in personam* jurisdiction.

Regarding Friko's failure to establish standing, the court stated:

> Friko's documentary evidence verifies its formation as a corporation, its power to open the seized accounts and to litigate this claim, but it does not tend to show that Friko itself conducts any kind of trade or business beyond holding

> legal title to various accounts, nor to establish Friko's existence independent of [Johnny] Daccarett.

United States v. Accounts Nos. 3034504504 and 144-07143, 971 F.2d 974, 987 (3d Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A QUESTION LEFT OPEN IN *CONTINENTAL GRAIN COMPANY* AND *REPUBLIC NATIONAL BANK OF MIAMI* REGARDING WHETHER A COURT WITHOUT JURISDICTION OVER THE *RES* HAS JURISDICTION OVER THE PARTIES

The Government invoked the *in rem* rules of admiralty to bring this case. Courts derive their power in *in rem* cases entirely from their control over the *res*. *Pennington v. Fourth National Bank*, 243 U.S. 269, 272 (1917); *see also United States v. Mack*, 295 U.S. 480, 484 (1935). The *res* in the instant case was not located in the State of New Jersey, where the Government brought this action. Nevertheless, the appellate court held that while the District Court of New Jersey had no jurisdiction over the res, it had *in personam* jurisdiction over Friko, and thus could adjudicate Friko's rights even without *in rem* jurisdiction.

The Third Circuit's analysis reopens a question left undecided by this Court in *Continental Grain Company v. Barge FBL-585*, 364 U.S. 19 (1960), and then touched upon again in the course of deciding *Republic National Bank of Miami v. United States*, 1992 W.L. 362823 (S.Ct., Dec. 14, 1992). In *Continental Grain Company* this Court had allowed a proceeding based on mixed questions of *in rem* and *in personam* jurisdiction to be transferred to a more convenient forum under 18 U.S.C. 1404(a), even though the *in rem* action by itself could not have been transferred. The instant case presents that aspect of *Continental Grain* that the Court did not need to decide: whether a purely *in rem* proceeding could be entertained in a court without jurisdiction over the *res*, particularly where one party has in fact objected to the court's jurisdiction. *See Continental Grain Company*, 364 U.S. at 39 (Whitaker, J., dissenting).

A related matter came before this Court in *Republic National Bank of Miami v. United States*. There this Court resolved a split in the Circuits regarding whether the appellate court retained jurisdiction over a civil forfeiture appeal once the *res* had been removed. However, in deciding that removing the *res* did not divest the appellate court of jurisdiction, that case did not address the question raised here. Rather, the case considered the question of the court's *continued* jurisdiction, not its *original* jurisdiction.

Indeed, to the extent the *Republic National Bank of Miami* Court touched upon the issue in this case at all, it did so in way that would require this Court to vacate the Third Circuit's decision and order it reconsidered in *Republic National Bank of Miami's* light. In reaching its decision, this Court noted that it has been "long understood that a valid seizure of the res is a prerequisite to the initiation of an in rem civil forfeiture proceeding." *Id.*, *citing United States v. One Assortment of Firearms*, 465 U.S. 354, 363 (1984); *Taylor v. Carryl*, 20 How. 583, 589 (1858). Elsewhere it noted that the cases have long held "that the court must have actual or constructive control of the res when an in rem forfeiture suit is initiated." *Republic National Bank of Miami*, 1992 W.L. 362823, *3, *citing The Brig Ann*, 9 Cranch 289 (1815). These comments by this Court are at distinct odds with the decision of the Third Circuit here, which held that the District Court could exercise its jurisdiction even though a valid seizure of the *res* had not been accomplished.

Thus, the instant case presents an even more fundamental question than the one decided in *Republic National Bank of Miami*. In that case, the lower court unquestionably had jurisdiction over the res when the case was filed; in the instant case the lower court unquestionably did not. Moreover, Friko objected to the exercise of jurisdiction in that situs. Accordingly, under the admiralty laws through which the Government brought the case, the court did not have jurisdiction.

In fact, the appellate court *agreed* that no jurisdiction existed over the *res*. As a result, the appellate court held that the District Court could not enter any orders regarding the *res* itself, although it could adjudicate Friko's claim. This specific sort of judicial gerrymandering would create just the sort of inefficient havoc that the Court in *Continental Grain Company* sought to avoid. There this Court noted the efficacy considerations inherent in 18 U.S.C. 1404(a) in ruling that a case featuring mixed actions *in rem* and *in personam* could be

transferred. As a consequence of the Third Circuit's reasoning here, however, additional litigation will be created. The Third Circuit held that while Friko's claim could be litigated, the Government must file *another* forfeiture action in the appropriate jurisdiction if it wants to dispose of the *res*. Efficiency here dictated dismissing the case in its entirety for lack of jurisdiction over the *res*.

Although the fictions inherent in admiralty jurisdiction have fallen on some disfavor, they have never been abandoned, by either this Court or Congress. This Court certainly did not appear inclined to alter the law when it decided *Republic National Bank of Miami*. The Third Circuit decision here is inharmonious with those concepts and that recent case.

Accordingly, this petition for a writ of certiorari should be granted. In the alternative, as to this issue the Court should enter an order vacating the decision of the Third Circuit Court of Appeals and order it to reconsider the exercise of jurisdiction based upon the ruling in *Republic National Bank of Miami*.

II. THIS CASE PRESENTS QUESTIONS REGARDING WHAT BURDENS EXIST AND UPON WHOM THEY ARE PLACED WHEN A CLOSELY HELD CORPORATION MAKES A CLAIM FOR FUNDS THAT ARE HELD IN THE CORPORATE NAME

This case presents significant questions about standing[2] and the right of a corporation to make a claim for funds deposited in the corporate name. It presents questions not yet addressed by this Court, concerning what a claimant must show to satisfy standing, the burden involved, and how to prove standing without requiring a claimant to address the merits of the underlying case. To date, the lower courts are addressing these issues using an *ad hoc* approach, with the rules being created on a case by case basis.

It would seem beyond cavil that a corporation has standing to assert a claim for property held in its name. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). The

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2. Two aspects of standing converge in a civil forfeiture case: statutory standing under the Supplemental Rules of Civil Procedure, and Article III standing. Friko complied with the prerequisites for statutory standing. Thus, the standing in question in this petition relates to Article III, or Constitutional standing.

courts below did not quarrel with this concept. However, they decided that Friko lacked standing because it did not adequately establish its trade or business or its existence independent of one of its corporate officers, Johnny Daccarett.

What Friko was required to show, however, remains unclear. Daccarett, for instance, was one of several corporate officers. The Government vaguely linked him to illegal activity but, as this case was not decided on the merits, Daccarett had no opportunity to refute the Government's allegations. Meanwhile, the Government implied some impropriety in Friko's $41,000 loan to Saad before the alleged money laundering conspiracy had begun. But raising these points only demonstrates why this Court must address standing in the civil forfeiture context: by referring to them, the lower courts required Friko to disprove the merits of the Government's case as a prerequisite to establish standing. This conflicts with other Circuits that warn against trying the underlying case in order to determine standing. *See, e.g.*, *United States v. $38,570, U.S. Currency*, 950 F.2d 1108, 1112 (5th Cir. 1992); *see also United States v. Forfeiture, Stop Six Center*, 781 F.Supp. 1200, 1202 (N.D. Tex. 1991).

Moreover, with no standards to guide it, the appellate court held that Friko was Daccarett's "straw man," apparently because he signed the corporate resolution to defend the criminal case and authorized the loan to Saad. Yet, none of this was improper or unusual under Colombian law. *See, e.g.*, Wurfel, *Foreign Enterprise in Columbia* (Univ. of North Carolina Press, 1965), at 321 (Colombian law allows binding authority in single manager); Pueda, *Statement of the Laws of Colombia* (Pan-American Union, 1961), at 46 (same). Friko includes other officers besides Johnny Daccarett, it was unclear what Friko had to prove to show standing, and there was little if anything presented below from which to conclude that Johnny Daccarett, as opposed to anyone else in the corporation, exercised such control to conclude that Friko was Daccarett's "straw man." The lower courts imposed an imponderable burden upon Friko to establish its standing. There are simply no standards to guide the courts.

This Court's silence has led the Circuits into a crazy-quilt approach to analyze standing. This may not be surprising, as this Court has described the concept as one of "the most amorphous . . . in the entire domain of public law." *Flast v. Cohen*, 392 U.S. 83, 98-99 (1968). The point of establishing standing should be simply to insure

that a claimant has that "concrete adverseness" that helps define issues, *see, e.g.*, 12 Moore's Federal Practice, par. 300.02 [.2-3], and a corporation that owns the *res* would certainly seem to possess that. If Friko could not satisfy that standard, then it was because, as one commentator points out, standing concepts have been applied more rigidly in civil forfeiture cases than in other areas of the law. 1 Smith, Prosecution & Defense of Forfeiture Cases, § 9.04(b)(i).

No reason for such a differing approach exists, and this Court has certainly never authorized one, particularly where a corporation makes a claim. The point of striking claims of "straw men" is to prevent someone from disguising his interest in property by placing it in someone else's name. *See, e.g., United States v. One 1982 Porsche 928*, 732 F.Supp. 447, 451 (S.D.N.Y. 1990). There was nothing secret about Friko, or about who had ownership or possessory interests. If the Government could prove that significant officers, such as Johnny Daccarett, used the corporation to launder money, Friko would not prevail on an innocent owner defense. But those facts do not make Friko a "straw man" for Daccarett.

Indeed, the inequity of the appellate court's approach is that it perpetuates an inconsistency that favors the Government in forfeiture cases. Ordinarily, corporate officers do *not* have standing to assert claims on behalf of the corporation. *See, e.g., Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 564 (5th Cir. 1990). In *United States v. D.K.G. Appaloosa*, 630 F.Supp. 1540 (E.D. Tex. 1986), *aff'd*, 829 F.2d 532 (5th Cir. 1987), the Government invoked that precept to take a position wholly opposite to the one in the instant case, arguing that the corporation rather than the criminal defendant had the only authority to make a claim for seized property. Standing should not exist as a procedural trap-door designed to thwart claimants based on how the Government chooses to view the case at any particular moment in time.

In all events, the present state of the law presents hodge-podge decision-making, precisely because no standards exist. To establish standing, some courts would seem to require little more than a facially colorable interest in the *res*, *see, e.g., United States v. One 18th Century Colombian Monstrance*, 797 F.2d 1370, 1375 (5th Cir. 1986), or any "recognizable legal or equitable interest." *United States v. $47,875.00 in U.S. Currency*, 746 F.2d 291, 293 (5th Cir. 1984). Some courts have

strayed from "legal or equitable" to require an "ownership or possessory" interest. *See United States v. One Parcel of Real Property*, 942 F.2d 74, 78 (1st Cir. 1991); *United States v. Miscellaneous Jewelry*, 667 F.Supp. 232, 235-36 (D.Md. 1987), *aff'd sub nom., United States v. One 1985 Nissan*, 889 F.2d 1317 (4th Cir. 1989) (en banc); *United States v. $122,043.00 in U.S. Currency*, 792 F.2d 1470, 1473 (9th Cir. 1986). Other courts may be satisfied with a possessory interest only. *See, e.g., United States v. $260,242, U.S. Currency*, 919 F.2d 686, 688 (11th Cir. 1990) (per curiam); *United States v. $38,000 in U.S. Currency*, 816 F.2d 1538, 1546 (11th Cir. 1987); *United States v. $191,910 in U.S. Currency*, 772 F.Supp. 473, 474-75 (N.D. Cal. 1991). The Eleventh Circuit, for instance, has held a simple bailee or agency interest sufficient, *see United States v. $38,000 in U.S. Currency*, 816 F.2d at 1560, which requires no ownership at all. *See also United States v. $122,043.00 in U.S. Currency*, 792 F.2d at 1473 (wife has standing to contest forfeiture of husband's money found in her possession).

Then again, courts requiring a possessory interest often require "some" ownership interest, thus moving from possession or ownership to possession plus ownership. *See, e.g., United States v. $28,570, U.S. Currency*, 950 F.2d 1108, 1112 (5th Cir. 1992). Still others speak of some "dominion and control" over the *res*, *see, e.g., United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986), but what that phrase actually requires is unclear. Most courts hold that simple legal title is insufficient, *see United States v. Premises Known as 536 Liscum Drive*, 866 F.2d 213, 217 (6th Cir. 1988); *United States v. One Parcel of Land Known as Lot 111-B*, 902 F.2d 1443, 1444 (9th Cir. 1990) (per curiam); *United States v. Twenty (20) Cashier's Checks*, 897 F.2d 1567, 1570 (11th Cir. 1990), but this, again, veers from those cases requiring a legal or equitable interest only.

Those courts that would require more than a legal or equitable interest have imposed requirements that exceed Congressional intent. There is no reason to assume that Congress intended "owners" as defined in 18 U.S.C. 981 to receive any less protection than "owners" defined in 21 U.S.C. 881(a)(6). That latter provision advises courts to construe the word "broadly . . . to encompass any person with a recognizable legal or equitable interest in the property seized." Joint Explanatory Statement of Titles II and III, 1970 Code Cong. & Ad. News 9496, 9522-23. Some courts, including the Third Circuit in this case, have required decidedly more.

This Court's silence has spawned these disparate decisions, inconsistent with Congressional intent and within their own ranks. The standards, and the burdens, have never been addressed. The appellate court in the instant case found that Friko failed to show any business beyond its holding legal title, yet legal title is what entitled Friko to make its claim, regardless of its business. Unless, of course, Friko's business controlled its right to make a claim, in which case the court was actually requiring Friko to address the merits of the underlying claim, a position other Circuits have not required.

Who has the burden, and what that burden entails, also needs to be addressed. Courts need guidance on what must be shown to establish standing. Daccarett was one principal in Friko, not the only one, yet based on the fact that he authorized a loan or an appearance for the corporation the Court presumed that Friko was his "straw man." Certainly there was not enough here to say that Friko did not have a valid claim to at least a *portion* of the seized property. *See, e.g., United States v. $321,470.00*, U.S. Currency, 874 F.2d 298, 303-04 (5th Cir. 1989).

What the Government must show to place this burden on a claimant, and what the claimant must show to rebut it, must be identified by this Court. Otherwise, the hodge-podge decision-making will continue, and lead to unjust results like in the instant case, where a corporation was not allowed to contest a seizure of nearly $2,000,000 of its assets on the merits.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Third Circuit. In the alternative, this Court should enter an Order vacating the Third Circuit's opinion and directing it to reconsider in light of this Court's opinion if *Republic National Bank of Miami*.

Respectfully submitted,

FRIKO CORPORATION

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, *Plaintiff,*	Civil Action No. 90-1262 (MTB)
CONTENTS OF ACCOUNT NUMBERS 3034504504 and 144-07143 at MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., *Defendant.*	**OPINION**

BARRY, District Judge

I. INTRODUCTION

The United States filed a complaint in this civil forfeiture action on March 29, 1990, and an amended complaint on May 14, 1990. A warrant for the arrest of the defendant, the contents of account number 144-07143, held at Merrill, Lynch, Pierce, Fenner & Smith, 2 Broadway, New York, N.Y., was subsequently issued and arrest of the account was effectuated on June 29, 1990.[1] In its amended complaint, the United States alleges that the account is subject to forfeiture pursuant the provisions of 18 U.S.C. § 981, which *inter alia*, renders forfeit "any [personal] property . . . involved in a transaction or

[1] *See* Return of Service of Process, June 29, 1990, Docket Item No. 9. Account number 144-07143 is a brokerage account. The complaint as originally filed only named account number 3034504504 as a defendant. Account 3034504504 is actually a credit card account associated with the underlying brokerage account. Separate warrants for the arrest of account 3034504504 were issued on February 7, 1990 and on May 14, 1990. *See* Affidavit of Neil R. Gallagher, sworn to September 9, 1990 (hereinafter "Gallagher Aff. I") at ¶¶ 2; *see also* Defendant's Brief of October 9, 1990 at Exh. D; *see also* Return of Service or Process, May 14, 1990, Docket Item No. 6. Although effective as to both "accounts", I will, for the sake of clarity, refer to account 144-07143 as the sole defendant.

attempted transaction in violation of [31 U.S.C.] section 5313(a) [requiring, under its attendant regulations, financial reports on currency transactions in excess of $10,000] or [31 U.S.C. section] 5324 [prohibiting the structuring of deposits so as to avoid filing a financial report as required by 31 U.S.C. § 5313 (a)] or of [18 U.S.C. § 1956] or [18 U.S.C. § 1957] [money laundering offenses]". *See* 18 U.S.C. § 981(a)(1)(A).[2] In essence, the United States alleges that the defendant account was used to facilitate a large and intricate money laundering scheme in which Columbian drug money was mailed to the United States, converted into money orders and checks, and deposited back into various drug-connected accounts both in the United States and abroad.

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[2] 18 U.S.C. § 981 provides, in pertinent part:

(a)(1) Except as provided in paragraph (2) [relating to "innocent owners"], the following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. . . .

See 18 U.S.C. § 981(a)(1).

31 U.S.C. § 5313(a), as referenced in 18 U.S.C. § 981 provides, in pertinent part:

When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution...shall file a report on the transaction at the time and in the way the Secretary prescribes. . . .

Pursuant to 31 C.F.R. § 103.22(a)(1), the Secretary of the Treasury requires financial reports on transactions over $10,000.00

31 U.S.C. § 5324, as referenced in 18 U.S.C. 981, provides, in pertinent part:

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

* * *

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institution.

18 U.S.C. § 1956 and 18 U.S.C. § 1957 as referenced in 18 U.S.C. § 981, generally forbid the offense of money laundering.

Legal title to the defendant account is held by Friko Corporation ("Friko"), a corporation organized under the laws of Panama, having its principal place of business in Columbia. *See* Affidavit of Robert Dunst, sworn to August 27, 1990 (hereinafter "Dunst Aff. I") at ¶ 6, Exhs. C. D. Friko has filed a claim contesting the forfeiture of the account, and has moved to dismiss the complaint and vacate the seizure on jurisdictional and other grounds. The United States, in turn, has moved to strike Friko's claim under the fugitive disentitlement doctrine or, in the alternative, for lack of standing.

For the reasons set forth below, Friko's motion to dismiss the complaint and vacate the seizure will be denied, and the motion of the United States to strike Friko's claim will be granted.

II. DISCUSSION

A civil forfeiture action is an *in rem* proceeding against a piece of property based on the legal fiction that the property itself is guilty of facilitating a related crime. *See generally, U.S. v. One 1982 Porsche 928*, 732 F.Supp. 447, 451 (S.D.N.Y. 1990). As the Supreme Court noted long ago in a similar context, "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient". *See Various Items v. United States*, 282 U.S. 577, 581 (1931).[3] Because it is the property which is the defendant, the guilt or innocence of the owner is generally considered to be irrelevant. *See* D. Smith, *Forfeiture*, p. 2-3; *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (*noting The Palmyra*, 12 Wheat. 1, 14-15 (1827) (Story, J.)). Put somewhat differently, "It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner simply being accidental". *See Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 513 (1921) (*noted in* D. Smith, *Forfeiture*, p. 2-3).

From the perspective of the government, an *in rem* action against a piece of property or system of accounts carries a distinct advantage over proceeding by way of an *in personam* action against a criminal defendant, inasmuch as the civil *in rem* action results, upon a lesser

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3. *Various Items* is also noted in D. Smith, *Prosecution and Defense of Forfeiture Cases* p. 2-3 (1991) [hereinafter cited as D. Smith, *Forfeiture*].

showing of proof, in the elimination of the underlying financial machinery of structured criminal activity and not merely the arrest and incarceration of the individuals who operate that structure. *See e.g.*, S.Rep.No.617, 91st Cong., 1st Sess. 78 (1969) (Senate Report on RICO) (*noted in* D. Smith, *Forfeitures*, p. 1-1).

The present civil action stems from a related criminal proceeding tried in this district before the Hon. Alfred J. Lechner, Jr. *See United States v. Cardona*, Crim. Action No. 90-69 (AJL). In that action, Friko and its President, Johnny Daccarett, as well as several other corporations and individuals, were charged, *inter alia*, with conspiracy to violate money laundering and transaction reporting statutes. Johnny Daccarett did not appear in that proceeding, and is a fugitive. For its own part, Friko was dismissed as a defendant without prejudice.

After the United States filed its complaint. Friko filed a notice of claim, contesting the government's right to forfeiture.[4] As noted earlier, Friko now moves to dismiss the complaint and vacate the seizure, and alleges: *first*, that the Court lacks jurisdiction over the res, which is located outside of this district; *second*, that it would be violative of Friko's due process rights as a defendant-claimant for the Court to proceed against the property when it is located outside of this district; *third*, that the complaint fails to comply with the pleading requirements of the Supplemental Rules; and *fourth*, that the government, even assuming the existence of jurisdiction and the sufficiency of the complaint, has failed to show a sufficient connection between the account and the underlying money laundering scheme so as to render the account forfeit. Each of these allegations will be addressed *seriatim*.

II(a). ***Motion To Dismiss For Lack of Jurisdiction***

In moving to dismiss for lack of subject matter jurisdiction, Friko argues as an initial matter that the defendant account is not located, as the government asserts, in New York, but is rather located in Panama, a country over which Friko asserts the jurisdiction of this court does not extend. *See* Friko Brief of June 24, 1990 at p. 4. *See also* Affidavit

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[4] Procedurally, claims for civil forfeiture are governed by the Supplemental Rules For Certain Admiralty And Maritime Claims ("Supplemental Rules"), which are part of the Federal Rules of Civil Procedure. *See* 18 U.S.C. 981 (b). *See also* Supplemental Rule A(2). Friko properly filed its claim pursuant to Supplemental Rule C(6).

of Alan Silber, sworn to June 25, 1990 (hereinafter "Silber Aff. I") at §§ 4, 5. There is no need to address this issue, however, as it is manifestly clear that the account is, in fact, located in New York. *See* Affidavit of Harry J. Lundgren, sworn to September 6, 1990 at §§ 2-5 and supporting documentation.

II(b). ***Motion To Dismiss On Due Process Grounds***

In an argument which is closely related to its basic jurisdictional challenge, Friko argues in the alternative that, even if the property is located in New York, it would be improper for the Court to proceed with this *in rem* action on the ground that, historically, an action *in rem* could only be brought in the district in which the res was located.[5] More particularly, Friko challenges the Court's assertion of jurisdiction over the res in New York as contravening the principles of due process set forth in the Fifth Amendment to the constitution of the United States. Friko bases this challenge on its understanding that it would be violative of its due process rights as a defendant-claimant to have to answer a forfeiture proceeding in a "foreign" district in which the property is not situated. *See* Friko Brief of October 9, 1990 at pp. 20-30.

Friko fails to recognize, however, that the district courts of the United States enjoy nationwide jurisdiction over suits brought under 18 U.S.C § 981, provided that certain venue requirements are met, venue requirements which, it will be seen, adequately address Friko's due process concerns. Thus, as evidenced in the venue provisions set forth in 18 U.S.C. § 981, a proceeding for forfeiture may be brought in the "judicial district in which the defendant owning such property is found or in the judicial district in which the [related] criminal prosecution is brought". *See* 18 U.S.C. § 981(h). In this case, jurisdiction is proper because the related criminal case was prosecuted in this district.

Moreover, and importantly in view of Friko's constitutional challenge, extra-territorial jurisdiction such as that exercised here has time and again been deemed to comply with the requirements of the Fifth Amendment, there being no violence to the principles of due

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5. The Supplemental Rules generally reflect this requirement. *See* Supplemental Rule C(2) ("[The complaint] shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action").

process when an *in rem* action is brought in the same district as that in which the related criminal case has been tried. As one court succinctly noted in construing the identically worded venue provisions set forth in 21 U.S.C. § 881(j):

> [V]iolation of the [underlying criminal statute] occurred [in the district where the forfeiture was brought] and, therefore, anyone involved in the criminal act should reasonably expect to be subject to the exercise of jurisdiction in that district . . . The relationship between the defendant-claimant and the forum under [the venue statute] is a reasonable one within the meaning of the due process clause. *See Hanson v. Denckla* [357 U.S. 235 (1958)].

See U.S. v. Premises Known As Lots 50 & 51 Etc., 681 F.Supp. 309, 312 (E.D.N.C. 1988) (*held*: federal district court sitting in Eastern District of North Carolina has jurisdiction over property located in Southern District of Florida); *accord*, *U.S. v. Parcel I., Beginning at Stake*, 731 F.Supp. 1348 (S.D.Ill. 1990) (*held*: federal district court sitting in Southern District of Illinois has jurisdiction over property located in Tennessee); *see also* D. Smith, *Forfeiture*, P. 9-33 (" . . . nor can there be any serious doubt about [section 881(j)'s] constitutionality").

I thus give little weight to Friko's jurisdictional arguments, and certainly will not dismiss the complaint on any purported jurisdictional ground. Moreover, to the extent that the Supplemental Rules generally governing these proceedings conflict with the later enacted and more detailed venue provisions of Section 981. I reject the Supplemental Rules. *See, e.g., U.S. v. Parcel I*, 731 F.Supp. at 1351.[6] *Cf.* Supplemental Rule C(2), *supra*, note 5.

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[6] I similarly reject Friko's subsidiary arguments which derive any force they may have from its claim that the Court lacks jurisdiction over the res. Thus, for example, Friko argues that service of process by the United States was defective because the res is outside the District of New Jersey, relying on Supplemental Rule E(3)(a) ("Process in rem...shall be served only within the district"). *See Parcel I*, 731 F.Supp. at 1351 ("Since process is necessary to perfect statutory jurisdiction, the claimant's argument [objecting to the 'failure' to comply with Supplemental Rule E(3)(a)], if followed, would render § 881(j) [venue] a nullity. A statutory construction which would impute a useless act to Congress must be viewed as unsound and rejected". (citation omitted)).

II(c). *Motion To Strike The Claim of Friko Corporation*

As indicated, legal title to the defendant account resides with Friko. In moving to dismiss Friko's claim, the United States asserts that Friko is not, in fact, a bona fide owner of the property, but is rather a straw man for the real party in interest, Johnny Daccarett, a fugitive. More particularly, the United States argues that it would be both improper and contrary to public policy for a fugitive to maintain or preserve property which would otherwise be subject to forfeiture by simply authorizing a corporation which he dominates to enter the jurisdiction and assert the claim on the fugitive's behalf.

For the reasons set forth below, I find the government's argument both well grounded in law and compelling as a matter of common sense, and will, therefore, order the Friko's claim stricken.

As a preliminary matter, I note that it has long been settled that, pursuant to the "fugitive disentitlement doctrine", a fugitive may not invoke the power of the Court to preserve his or her property in a civil forfeiture action while at the same time flaunting the Court's criminal processes. *See, e.g., United States v. Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) In United States Currency*, 739 F.2d 792 (2nd Cir. 1984); *U.S. v. One Parcel of Real Estate Dade County, Fla.*, 868 F.2d 1214 (11th Cir. 1989). Indeed, in such a situation, the fugitive is deemed to have waived his right to due process, *see United States v. Forty-Nine Thousand*, 739 F.2d at 798, and judgment may be entered in the government's favor as an uncontested matter. *See U.S. v. One Parcel*, 868 F.2d at 1217; *see also United States v. $239,500 In U.S. Currency*, 764 F.2d 771 (11th Cir. 1985) (*held*: fugitive's claim properly dismissed as sanction pursuant to Fed.R.Civ.P. 37(b) for twice failing to appear at a deposition; merits of the underlying claim irrelevant).

While generally not disputing the validity of the fugitive disentitlement doctrine, Friko asserts that it is not itself a fugitive and, therefore, that the doctrine is inapplicable to its claim. I am unpersuaded. The facts indicate that the only principal officers of Friko besides Johnny Daccarett, its president, are Jorge Daccarett and Joseph Daccarett, both apparently members of Johnny Daccarett's family, who serve as Friko's secretary and treasurer, respectively. *See* Dunst Aff. I at ¶ 6, Exh. C. Johnny Daccarett alone signed the corporate resolution authorizing the legal representation of Friko in the criminal case then pending before Judge Lechner. *Id.* at ¶¶ 10, 11,

Exhs. G, H. It is absolutely clear, at least to me, and that the corporation, which has tendered nothing which even suggests that it functions as a legitimate enterprise, is little more than a shell. In any event, Johnny Daccarett has thus far failed to appear to give any account of how the corporation functions, and it is thus impossible to ascertain that it is anything other than that which the government asserts, *i.e.*, a holding organization for laundered money.[7]

Under these circumstances, I will not permit Friko's claim to stand. As one commentator suggests:

> The courts should nonetheless be ready to thwart efforts by the bailee/claimant to shield the owner from scrutiny. *Cf. The Schooner Adeline*, 13 U.S. (9 Cranch.) 244, 3 L.Ed. 719 (1815). In narcotics cases involving large cash seizures or other extremely valuable property, the true owner often attempts to conceal his identity and his interest in the property through various smoke-screens including straw owners and alter ego corporations. The claimant in such cases is usually a bailee, straw owner or alter ego corporation. Even if the claimant has standing to contest the forfeiture, this should not excuse the owner, who is the real party in interest, from searching inquiry by the government.

See D. Smith, *Forfeiture*, p. 9-58, n. 22. Here, as indicated, the absence of Johnny Daccarett makes it impossible to subject him to "searching inquiry", and the only information known to the Court about the activities of Friko is that it is both a supplier and recipient of funds in a

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[7] While it is not necessary to put the government to its proof, *see infra*, note 8, I note that the government has established substantial links between the defendant account and the money laundering scheme, as set forth in the complaint and subsequent documentation. Thus, for example, the United States has established that one Luis E. Saad received $41,000.00 from the defendant account, and that Saad was subsequently involved in a pervasive money laundering scheme. *See generally*, Dunst Aff. I at ¶¶ 9, 12-16. While Saad has indicated that he received this money to establish a textile business, *see* Affidavit of Luis E. Saad at ¶¶ 2-8, I am not prepared to accept this explanation, inasmuch as Saad is himself a fugitive and an indicted co-conspirator of Friko. Under the circumstances, it would be entirely inappropriate to permit one fugitive conspirator to testify by way of affidavit in favor of another in order to establish the "legitimacy" of the transactions under scrutiny. Saad aside, I also note that Friko has not been able to explain the remaining substantial evidence linking the defendant account to the money laundering scheme. *See esp.* Dunst Aff. I at ¶ 14.

thus-far well documented money laundering scheme. *See supra*, note 7.

Finally, I note that, as the government suggests, the same result is compelled under analogous principles relating to standing. It has long been settled in the law of forfeitures that it is the claimant's burden to demonstrate as a threshold matter actual ownership and control over the res, and not merely possession of legal title. *See e.g.*, *U.S. v. One 1982 Porsche 928*, 732 F.Supp. at 451 ("While ownership may be proven by actual possession, dominion, control, title and financial stake, '[t]he possession, of bare legal title to the *res* may be insufficient,' absent other evidence of control or dominion over the property", *citing*, *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, (Appeal 1), 604 F.2d 27, 28-29 (8th Cir. 1979); *United States v. One 1945 Douglas D-54 (DC-4) Aircraft*, (Appeal 2), 647 F.2d 864, 866 (8th Cir. 1981); *United States v. One 1977 36 Foot Cigarette Ocean Racer*, 624 F.Supp. 290, 294-295 (S.D.Fla. 1985)). Friko has produced nothing of substance to establish that it held anything more than legal title to the account, and has thus failed to demonstrate that it has standing to contest the forfeiture. Accordingly, its claim will be stricken.[8]

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8. Given this disposition, I need not reach Friko's arguments that the government has not pled the facts of its case with sufficient specificity and that the government has not established a sufficient connection between the account and the associated money-laundering scheme so as to render the account forfeit. *See generally*, D. Smith, *Forfeiture*, pp. 9-55 - 9-56 ("Unless a claimant can first establish his standing he has no right to put the government to its proof. Thus, property may be forfeited without any showing by the government that it is subject to forfeiture if the only claimant is unable or unwilling to provide evidence supporting his assertion of an interest in the property." (citations omitted)).

III. CONCLUSION

For the reasons set forth above, Friko's motion to dismiss the complaint on jurisdictional and other grounds will be denied, and the motion of the United States to strike Friko's claim under the fugitive disentitlement doctrine or, in the alternative, for lack of standing, will be granted.

/s/ Maryanne Trump Barry

MARYANNE TRUMP BARRY
U.S.D.J.

Dated: April 5, 1991

APPENDIX B

Filed July 22, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5470 & 91-5768

UNITED STATES OF AMERICA

v.

CONTENTS OF ACCOUNTS NOS. 3034504504 AND 144-07143 AT MERRILL, LYNCH, PIERCE, FENNER AND SMITH, INC.

FRIKO CORPORATION,

Claimant

FRIKO CORPORATION,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 90-01262)

Submitted Under Third Circuit 12(6)

January 31, 1992

PRESENT: SLOVITER, *Chief Judge*, MANSMANN and HUTCHINSON, *Circuit Judges*

(Filed July 22, 1992)

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*.

These *in rem* forfeiture proceedings involve two accounts opened with Merrill, Lynch, Pierce, Fenner & Smith in the name of Friko Corporation (Friko), a Panamanian corporation. At Docket No. 91-5470 Friko appeals an order of the United States District Court for the District of New Jersey that struck its claim to those accounts. The district court struck Friko's claim after holding Friko lacked standing to contest the seizure. Not only does Friko contend that it had standing, it also contends that the district court lacked jurisdiction to entertain the forfeiture proceeding because the accounts were not located in the same district in which the *in rem* forfeiture was filed. At Docket No. 91-5768 Friko also appeals from a subsequent order of the district court denying, as

untimely, Friko's motion for reargument of the order striking its claim to the *res*.

Preliminarily, after examining the district court's jurisdiction, we hold that court had jurisdiction over the dispute between the government and Friko and that venue was properly laid in New Jersey. We also hold, however, that the district court lacked jurisdiction to determine the government's rights to the *res* versus the rest of the world. On the merits, we hold that the district court, on the evidence before it, did not err in ruling that Friko is nothing more than a straw man, or alter ego, for Johnny Daccarett (Daccarett), the true owner of the accounts. Thus, the district court was correct in concluding that Friko did not have standing to object to the forfeiture. Accordingly, on Friko's appeal No. 91-5470 we will affirm the orders of the district court striking Friko's claim for lack of standing and its consequent order entering a default judgment against Friko, but vacate its order entering a default judgment in favor of the government as to the *res* itself.

Finally, we have concluded that Friko's motion for reargument is properly treated as a motion for relief under Federal Rule of Civil Procedure 60(b) rather than Rule 59(e). As such, we hold it was timely. Thus, on Friko's appeal at No. 91-5768 we will remand the case to the district court so that it can exercise its discretion to grant or deny that motion.

I.

Following a criminal indictment filed in the United States District Court for the District of New Jersey alleging money laundering against, *inter*

alia, Julio Montes Cardona (Cardona), Daccarett, Friko, and Quasil International Corporation (Quasil), the government filed an amended complaint for civil forfeiture *in rem* against Friko's accounts 3034504504 (the credit card account) and 144-07143 (the brokerage account) (collectively "the accounts") at Merrill, Lynch, Pierce, Fenner & Smith (the broker) in New York, New York on May 14, 1990 in the United States District Court for the District of New Jersey. A seizure warrant for the arrest of the brokerage account was then served on the broker in the United States District Court for the Southern District of New York. The credit card account had already been arrested.

Friko filed an objection to the forfeiture of the seized property on June 7, 1990. Thereafter, it filed a motion to dismiss the amended complaint on numerous grounds including lack of *in rem* jurisdiction. On August 31, 1990, the government moved to strike Friko's claim on the ground that Friko had no standing to object to the forfeiture because it was just a straw man for the true claimant, its president Johnny Daccarett, who did not have standing because he is a fugitive.

In an opinion and judgment entered on April 8, 1991, the district court denied Friko's motion to dismiss and granted the government's motion to strike Friko's claim. The district court held that it had jurisdiction over the forfeiture proceeding because Friko and Daccarett had been indicted in *United States v. Cardona*, No. 90-69 (D.N.J.), a related criminal case. The district court struck Friko's claim for lack of standing after concluding that Friko, as a straw man for the true claimant, Daccarett, had no standing and held that

Daccarett himself was not entitled to challenge the seizure because he was a fugitive. The government then moved for an order that Friko had defaulted by failing to assert any cognizable right in the *res*. That motion was granted on April 19, 1991. Subsequently, a default judgment which awarded the *res* to the government was entered on the forfeiture complaint on May 24, 1991.

Unaware that a default judgment had been entered awarding the government full ownership of the *res*, *see infra* note 10, Friko filed a motion for reargument on the order striking its claim to the *res*. The motion for reargument was filed the same day the default judgment awarding the *res* to the government was entered. It was returned to Friko's attorneys because they had failed to set forth a return date for the motion.

On May 31, 1991, Friko filed a proper motion for reargument on the order striking its claim. In its renewed motion for reargument, Friko also asked that the April 19, 1991 default order entered due to its failure to assert a cognizable right in the *res* be vacated. In addition, on the same day, May 31, 1991, Friko filed a timely notice of appeal from the order striking its claim. As stated, we docketed that appeal at No. 91-5470.[1] The

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1. Even though the notice of appeal in No. 91-5470 was filed at the same time the motion for reargument was filed, we have appellate jurisdiction over that appeal. If the district court correctly framed the motion for reargument of the April 8 order as a motion made under Federal Rule of Civil Procedure 59(e), that motion was untimely, void and of no effect on the simultaneously filed notice of appeal in No. 91-5470. *See* Fed. R. App. P. 4(a)(4); *In re Bankers Trust Co.*, 752 F.2d 874, 880 n.7 (3d Cir. 1984). If, on the other hand, the motion for reargument is a Rule 60(b) motion, our

government opposed the motion for reargument. On July 31, 1991 the district court denied the motion for reargument as an untimely Rule 59(e) motion for reconsideration, and refused to set aside the default. On September 24, 1991, Friko filed its second notice of appeal, docketed at No. 91-5768, from both the April 8 order and the July 31 denial of reconsideration.

II.

This forfeiture is part of the government's efforts to halt money laundering by drug dealers in the United States. According to the government, after drug dealers in the United States with suppliers in South America collect the cash proceeds of their illicit sales they face the problem of transferring money back to South America to pay the suppliers. Our federal banking laws are structured to minimize the use of our banking system to channel these illegal cash proceeds to South America.

Accordingly, any time a financial institution is involved in an all cash transaction that exceeds an amount specified by a banking regulation, it must be reported by the financial institution involved. *See* 31 U.S.C.A. § 5313 (West 1983). Current regulations require cash transactions exceeding $10,000.00 to be reported. *See* 31 C.F.R. § 103.22(a)(1) (1991). If the reporting requirement is not observed, criminal penalties are imposed. 31 U.S.C.A. § 5322 (West Supp. 1992). It is also illegal to structure transactions intentionally to

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appellate jurisdiction is equally unaffected. Rule 60 motions do not affect pending notices of appeal. *See* Fed. R. App. 4(a)(4); *Bankers Trust Co.*, 752 F.2d at 880 n.7. We consider this issue *infra*, Part VI, typescript at 33-37.

avoid the financial institution's reporting requirement. *Id.* § 5324 (West Supp. 1992). Thus, systematic cash deposits in an amount less than $10,000.00 that are made for the purpose of avoiding section 5313's bank reporting requirement subjects the depositor to that section's criminal penalties. Purchasing money orders and then depositing the money orders in a bank account in order to avoid the section 5313 reporting requirement also subjects the depositor to section 5324's penalties.

Friko was formed in September of 1980. Its principal directors and corporate officers were all members of the Daccarett family. Jorge Daccarett, Friko's Secretary, has signed an authorization that allows Johnny and Delia Daccarett to obligate the company. Friko opened the accounts in question in Panama in October of 1983 and believed them to be located there. In fact, the brokerage account is held in New York, while certain free credit balances are held in the United Kingdom.[2]

The indictment charged that Cardona ran a money laundering operation in New Jersey and that Friko, Daccarett and Quasil, a Panamanian company owned by Daccarett, *inter alia*, participated in that operation. The investigation uncovered evidence that substantial sums passed between the accounts of Quasil and Friko. Quasil's

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2. The parties do not tell us how these free credit balances arose, the nature of the rights they evidence or the persons entitled to those rights. In any event, the "free credit balances," like the accounts, are not located in New Jersey. If they are located in the United Kingdom, we leave to the district court any question concerning its subject matter jurisdiction over them. The district court's subject matter jurisdiction over the accounts themselves is dealt with in footnote 4, *infra*.

Florida accounts show deposits from the Cardona money laundering operation of 351 money orders of small denominations totaling $224,000.00 over an eight-month period, many of which were sequentially numbered. Moreover, a $41,000.00 check from Friko's brokerage account was used to open a New York savings account by Luis Saad, who also had dealings with the Cardona operation and another Quasil account in Panama. The government states that its investigation has not uncovered any business activities for Friko or Quasil except for a series of transactions in various bank accounts on which they are shown as holders of legal title.

Friko "present[s] itself as a money exchanger in Colombia['s] parallel market." Brief of Appellant in No. 91-5470 at 6. In support it presented an affidavit of Mohammad Haris Jafri, an economist formerly with the International Money Fund. Jafri stated that South American businesses frequently hold dollars in American banks as a hedge against the volatility of South American currencies. Saad also filed an affidavit on Friko's behalf. He stated that he worked for his father's textile business and went regularly to New York to buy textiles. Saad says he had no cash to buy the textiles because his money was all tied up in certificates of deposit, when Daccarett, a friend of Saad's father, helped him out by giving him $41,000.00 for the purpose of buying textiles. The $41,000.00 was Saad's initial deposit in his New York account. Saad said he has repaid Daccarett.

Friko and Daccarett were named as defendants in the *Cardona* indictment. While Daccarett himself did not enter an appearance, he signed a corporate resolution that authorized an

appearance for Friko as a defendant in the Cardona criminal case. The government subsequently chose to dismiss Friko from the criminal case on October 19, 1990 but continued to proceed on its civil forfeiture action against the accounts Friko claims it owns. At the time the accounts were seized, Friko says they had a balance totaling more than $1,700,000.00.

After the district court held that Friko was a straw man for Daccarett and struck its claim, Friko, in support of its motion for reargument, submitted an affidavit from Isidoro Rodriguez (Rodriguez), a member of the Virginia bar as well as Friko's lawyer in Colombia. Rodriguez stated that Daccarett is the "Legal Representative" for two of Colombia's one-hundred largest exporters and that the combined transactions of these two exporters totaled over $9,000,000.00 in the first half of 1990. Rodriguez also swore that Friko was formed to help facilitate these transactions and that Friko's initial capitalization came from the sale of another Daccarett-family-owned business. Finally, he represented that Friko "is capable of presenting documentation to establish its legal and equitable interest in the property seized." Supplemental Appendix in No. 91-5768 at 126.

III.

We have appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C.A. § 1291 (West Supp. 1991).[3] Friko disputes the

3. Both parties cite *McKay v. Heyison*, 614 F.2d 899, 903 (3d Cir. 1980) for the proposition that an order striking a claim is final and appealable as of right. *McKay* stands for the proposition that the denial of a motion to intervene as of right is final and appealable. *Id.* Thus, both parties liken the claim

district court's jurisdiction over the accounts the government seeks forfeiture of. The resolution of this dispute will determine whether the district court had the power to decide if Friko had any claim to the accounts and whether they were forfeited to the government.

IV.

We must first address several threshold questions concerning subject-matter jurisdiction, due process, venue, *in rem* jurisdiction and service of process. We will consider them in turn before reaching Friko's arguments that it had standing to contest the forfeiture and that its motion for reargument was erroneously denied.

A.

Friko frames its venue argument in terms of due process, arguing that "[a]lthough federal courts have nationwide jurisdiction, due process demands at least *some* connection to the District."[4] Brief for

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procedure in forfeiture to intervention. We accept this analogy since the government proceeds against the *res* in a forfeiture proceeding and any claimants to that *res* assert their claims by intervening in the action. *See* David B. Smith, *Defense and Prosecution of Forfeiture Cases*, ¶ 9.04, at 9-58.1 to 9-58.2 (1985 & Supp. 1991).

4. Friko's argument appears, at times, to go to the district court's subject-matter jurisdiction as well as to territorial jurisdiction. To the extent that it goes to subject-matter jurisdiction, we summarily reject it. Congress has given the district courts nationwide subject-matter jurisdiction over civil forfeiture cases like this. *See, e.g.*, 28 U.S.C.A. § 1345 (West 1976) (district courts have jurisdiction over civil suits commenced by United States unless otherwise noted); 28 U.S.C.A. § 1355 (West Supp. 1992) (district courts have

Appellant in No. 91-5470 at 24 (emphasis in original). Friko says that the Supplemental Rules For Certain Admiralty And Maritime Claims (Supplemental Rule(s)) set forth the minimal requirements for a connection that is sufficient to meet due process standards in proceedings *in rem*.[5] Supplemental Rule C(2) provides in relevant part:

> In actions in rem the complaint shall be verified on oath or solemn affirmation. *It shall describe* with reasonable particularity *the property* that is the subject of the action *and state that it is within the district or will be during the pendency of the action.*

Supp. R. For Certain Admiralty And Maritime Claims C(2) [hereinafter "Supp. R."] (emphasis added). Friko also relies on Supplemental Rule E(3)(a). It states:

> *Process in rem* and of maritime attachment *shall be served only within the district.*

Supp. R. E(3)(a) (emphasis added). Both rules presuppose that the *res* is located in the district where the action is commenced. Friko, therefore, argues that the District of New Jersey lacked venue over this *in rem* action for forfeiture because the *res* was in the Southern District of New York and 18 U.S.C.A. § 981(h) (West Supp. 1992),

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jurisdiction over any forfeiture under an Act of Congress).

5. The admiralty and maritime rules provide "[t]hese rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not." Supp. R. For Certain Admiralty And Maritime Claims A.

concerning venue in forfeiture cases, is unconstitutional. This question is one of law over which we exercise plenary review. *See Air Courier Conf. of Am./Int'l Comm. v. United States Postal Serv.*, 959 F.2d 1213, 1217 (3d Cir. 1992).

Section 981(h) reads:

> In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Id. § 981(h). Here, Friko was indicted as a co-defendant in the Cardona criminal prosecution in the District of New Jersey. The government, therefore, contends that a proceeding to forfeit Friko's bank accounts can be brought in the District of New Jersey under section 981(h).

Section 981(h) is recently enacted and we have found only two reported cases that have even mentioned it. *See United States v. All Funds On Deposit In Any Account At Certain Fin. Insts. Held In The Names Of Certain Individuals*, 767 F. Supp. 36, 39-40 (E.D.N.Y. 1991); *United States v. Contents of Account Number 11671-8*, 763 F. Supp. 53, 54 (S.D.N.Y. 1991). Neither deals with the due process question Friko raises and neither undertakes any materially helpful discussion or analysis of section 981(h). They do no more than provide examples of situations in which section 981(h) afforded a district court venue over civil

forfeiture actions against a *res* outside the district when the forfeiture action was related to criminal proceedings brought within the district. *See All Funds*, 767 F. Supp. at 39-40 (venue over forfeiture proceedings concerning four accounts located in the Southern District of New York properly laid in the Eastern District of New York); *Account Number 11671-8*, 763 F. Supp. at 54 (venue over proceedings concerning account located in District of Puerto Rico properly laid in the Southern District of New York).

Section 981(h) is, however, a veritable clone of 21 U.S.C.A. § 881(j) (West Supp. 1992) (forfeiture proceedings related to drug prosecutions).[6] Section 881(j) has been the subject of eight reported cases. Only in one, *United States v. 11205 McPherson Lane*, 754 F. Supp. 1483, 1484-89 (D. Nev. 1991), has a court held that section 881(j) did not give it power to deal with a *res* located outside the district in which the forfeiture proceeding was brought, and there the court pointed out the problem was not venue but territorial jurisdiction. *Cf. United States v. 6960 Miraflores Ave.*, 932 F.2d 1433, 1435 (11th Cir. 1991) (government may prosecute "forfeiture action either in the district

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6. *Compare* 18 U.S.C.A. § 981(h), *supra* typescript at 13, *with* 21 U.S.C.A. § 881(j):

> In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for the forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found of in the judicial district in which the criminal prosecution is brought.

where the *res* is located, in the district of the criminal prosecution, or the district in which the owner is found"), *petition for cert. granted sub. nom., Republic Nat'l Bank v. United States*, 112 S. Ct. 1159 (1992) (certiorari granted on an unrelated issue); *United States v. Maull*, 855 F.2d 514, 517 (8th Cir. 1988) (forfeiture prosecution may be brought either where *res* is located or criminal prosecution is brought); *United States v. 218 Panther St.*, 745 F. Supp. 118, 119 n.2 (E.D.N.Y. 1990) (noting statute in dicta), *aff'd sub. nom. United States v. Eng*, 951 F.2d 461 (2d Cir. 1991); *United States v. Section 28, Block 1, Lot 48.221*, 131 F.R.D. 27, 28 (D.R.I. 1990) (claimant's motion for transfer of forfeiture proceedings to Southern District of New York granted when indictment had been transferred there and *res* was there); *United States v. Parcel I*, 731 F. Supp. 1348, 1351 (S.D. Ill. 1990) (forfeiture proper when brought in same district as related criminal proceeding); *United States v. 5708 Beacon Dr.*, 712 F. Supp. 525, 527 (S.D. Miss. 1988) (same); *United States v. 2050 Brickwell Ave.*, 681 F. Supp. 309, 311 (E.D.N.C. 1988) (same).

These cases persuade us to reject Friko's argument that section 981(h)'s limited grant of venue over civil actions for forfeiture of a *res* to district courts that do not have the *res* within their boundaries violates due process. By limiting venue in civil forfeiture proceedings to those districts that have venue over a related criminal proceeding, section 981(h) prevents the government from seeking civil forfeiture in a court so inconvenient for the defendant or the claimant that either of them is deprived of the fundamental fairness that is at the core of due process. Section 981(h)

assures that the criminal defendant whose alleged misconduct is the basis on which the government asserts its right to forfeiture will already be present or subject to personal jurisdiction in the forfeiture venue because it is only there that the related criminal action can proceed (other than where the *res* is or its owner is found). Since venue in a criminal proceeding is constitutionally restricted to "the State where the said Crimes shall have been committed," U.S. Const. art. III, § 2, cl. 3, civil forfeiture venue under section 981(h) is similarly restricted to a district in the state where the related crime was committed. We therefore hold that the district court's assumption of venue under section 981(h) does not infringe Friko's constitutional right to due process.

B.

Friko's argument also goes to the absence of *in rem* (territorial) jurisdiction over the *res*, as well as the court's lack of power to hear the government's cause because of a lack of venue. Friko contends that the district court was without territorial jurisdiction because the *res* was not located in the District of New Jersey. The district court ruled that territorial jurisdiction existed in the District of New Jersey under section 981(h). Friko's challenge to the district court's assertion of territorial jurisdiction is a question of law over which we exercise plenary review. *See Bumberger v. Insurance Co. of N. Am.*, 952 F.2d 764, 766 (3d Cir. 1991).

The government asserts "[t]here is no doubt that the territorial jurisdiction of the United States District Court for the District of New Jersey in a forfeiture proceeding includes New York City. Its

jurisdiction is limited only by the nation's borders and the venue provisions. Congress created nationwide jurisdiction when it passed 18 U.S.C. § 981(h) . . . ." Brief for Appellee in No. 90-5470 at 27-28 (citation omitted); *see* 18 U.S.C.A. § 981(a)(1)(A) (West Supp. 1992).

Friko's jurisdictional argument is not controlled by section 981(h)'s validity as a venue statute. Venue, though dependent upon jurisdiction, is distinct from it.

> Venue does not refer to jurisdiction at all. "Jurisdiction" of the court means the inherent power to decide a case, whereas "venue" designates the particular [district] in which a court with jurisdiction may hear and determine the case.

Black's Law Dictionary 1396 (5th ed. 1981). *See generally* 4 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 1070 (2d ed. 1984) (discussing *in rem* jurisdiction). The government's premise, that section 981(h) automatically expanded the district court's *in rem* jurisdiction to the same extent as its venue, must be examined.

When subject-matter jurisdiction and venue are present but the *res* that is said to afford a district court *in rem* jurisdiction is located outside the district in which proceedings against the *res* are brought, service of process must be available if a district court is to exercise jurisdiction over the *res*. *See The Rio Grande*, 90 U.S. (23 Wall.) 458, 463 (1874). In this case, the *res* is in New York, not New Jersey, and the Supplemental Rules on which service of process depends provide for service only within the district in which the court

seeking to exercise power over a *res* is located. *See* Supp. R. E(3).

The Federal Rules of Civil Procedure allow process to "be served anywhere within the territorial limits of the state in which the district court is [located]," unless a federal statute authorizes otherwise, subject to an exception not relevant here. Fed. R. Civ. P. 4(f). They also allow service under any statute of the state within which the district court sits. *Id.* 4(e). The government has made no contention, however, that any New Jersey statute applies in this case. Thus, without federal statutory authorization, the district court cannot serve process on any *res* located outside of New Jersey. For that authorization, the government turns again to section 981(h).

As we have explained, section 981(h) gives venue to a district court that does not have the *res* within its boundaries when a related criminal prosecution is brought within the district. It is silent with respect to service of process, as is 21 U.S.C.A. § 881(j), the model for section 981(h). Despite section 981(h)'s silence on the subject of service of process, the government says that it authorizes extra-territorial jurisdiction as well as venue over a *res* outside a district's boundaries. In order to do so, the government seeks to imply a provision for a nationwide service of process into section 981(h). The government concedes that section 981(h) has no legislative history but asks us to look to its first born twin, section 881(j). Curiously, the government also concedes the absence of relevant legislative history for section 881(j) and instead finally asks us to look to the legislative history of 21 U.S.C.A. § 853 (West Supp. 1992).

There, in the history of section 853, the government discovers part of a Senate Committee report that it says supports its argument that section 981(h) implicitly provides territorial jurisdiction over civil forfeiture proceedings *in rem* beyond the district in which the *res* is located. The history the government refers to reads:

> A third major problem with current forfeiture statutes arises from the need to pursue virtually all forfeitures of drug-related property through civil proceedings. Until recently, civil forfeiture proceedings under title 21 were not perceived as particularly problematic. Indeed, in certain respects, civil forfeiture has advantages over criminal forfeiture. As noted above, property is generally seized early on in a civil forfeiture case, thus limiting the problem of transfers and concealment of assets. Also, the government's burden of proof is lower in these cases. However, as drug trafficking has increased and the government has stepped up its enforcement and forfeiture efforts, the backlog of civil forfeiture cases in some parts of the country has become unmanageable. A way of relieving this problem would be to allow Federal prosecutors, in appropriate circumstances, to pursue criminal, rather than civil, forfeitures in drug cases. The problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in addition to the criminal case, to file a separate civil suit. And where the property of a defendant, or defendants, in the criminal case is located in

> more than one judicial district, a separate civil forfeiture suit must be filed in each of these districts.
>
> A more efficient method of obtaining the forfeiture of assets of drug defendants would be to permit prosecutors the option of pursuing a criminal forfeiture in which the forfeiture action can be consolidated with the prosecution of the offense giving rise to forfeiture. In cases where this alternative could be pursued, valuable judicial and law enforcement resources could be saved.

S. Rep. No. 225, 98th Cong., 2d Sess. 196-97, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3379-80.

The Supreme Court of the United States appears increasingly reluctant to rely on legislative history even more on point than that which the government cites here. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 846 (1992). It also seems to be especially reluctant to imply provisions that are ordinarily expressly stated into statutes that do not mention them. *See, e.g, Suter v. Artist M.*, 112 S. Ct. 1360 (1992). Here, the only legislative history the government has supplied comes from a different statute and it is easily and naturally read as relying on an alternate procedure to meet the problem that implication of a service of process provision into section 981(h) would solve. The statute's silence puts the government in an embarrassing position somewhat akin to that of Dr. Watson when he, unlike Sherlock Holmes, failed to see any significance in a dog's failure to bark. *See* Sir Arthur Conan Doyle, *The Hound of*

the Baskervilles, *reprinted in* 2 *The Complete Sherlock Holmes* (Doubleday & Co. 1930).

Section 853 deals with *criminal* forfeitures. *See* 21 U.S.C.A. § 853. Our case is one for *civil* forfeiture. *See* 18 U.S.C.A. § 981. On its face, this excerpt from the legislative history of section 853 that the government relies on indicates that Congress recognized a problem in asserting extra-territorial jurisdiction over *in rem* civil forfeitures but nevertheless decided not to extend service of civil process beyond the district in which the *res* is found, choosing instead to deal with the problem through the alternate procedure of criminal forfeiture. The legislative history the government cites does not support its argument with respect to extra-territorial *in rem* jurisdiction over civil forfeitures.

In any event, we think the teaching of the Supreme Court precludes us from implying a provision for extra-territorial service of process into section 981(h). It has stated:

> It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress has failed to do so[] argues forcefully that such authorization was not its intention.

Omni Capital, Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987). *Omni Capital* held that a provision for nationwide service of process could not be implied into Section 22 of the Commodities Exchange Act. *Id.* at 107-08.

We recognize that in *Omni* the Court was influenced by the fact that other sections of the Commodities Exchange Act did authorize nationwide service of process. *Id.* at 104-08. Thus,

Omni Capital may be distinguishable on its facts since the civil forfeiture laws contain no sections that provide explicitly for nationwide service of process. We do not think this distinction is controlling. In many other contexts, the utility of a nationwide service of process provision has not been lost on Congress. Aside from the Commodities Exchange Act, Congress has expressly provided for nationwide service of process in the civil Racketeer Influenced and Corrupt Organizations Act, *see* 18 U.S.C.A. § 1965(b) (West 1984), the Securities Act of 1933, *see* 15 U.S.C.A. § 77v(a) (West Supp. 1992), the Securities Exchange Act of 1934, 15 U.S.C.A. § 78aa (West Supp. 1992), and the Employee Retirement Income Security Act, *see* 29 U.S.C.A. § 1132(e)(2) (West 1985). *See 11205 McPherson Lane*, 754 F. Supp. at 1488; *see also* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1220 n.14 (1992) (noting nationwide service of process provided for in Arbitration Act, 9 U.S.C.A. § 9 (West 1970) and Sherman Act, 15 U.S.C.A. § 5 (West 1973)); Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule* 4, 64 N.Y.U. L. Rev. 1117, 1123 n.30 (1989) (listing another twelve nationwide statutes providing for nationwide service of process). In the absence of clear evidence in the legislative history that Congress intended to allow nationwide service of process when it enacted section 981(h), we do not think we can imply authorization for nationwide service from section 981(h)'s liberalized rule on venue.

We might be more inclined to imply into section 981(h) a provision for nationwide service of process if, without the extended venue it provides for, civil forfeitures would lose all practical effect, but that is not the case. Without section 981(h), "[a] civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found," 28 U.S.C.A. § 1395(b) (West 1976). Absent section 981(h), the District of New Jersey would be an improper venue for civil forfeiture of a *res* even as to the defendants in the related criminal action. Again, we remind the reader that Section 981(h)'s grant of venue to a district court in which a related criminal proceeding has been brought permits the District Court of New Jersey to adjudicate any rights the criminal defendants subject to its jurisdiction may have in a *res* located in New York, or elsewhere, without regard to service of process. *See* 18 U.S.C.A. § 981(h). Whenever a criminal case is pending in the district where the related civil forfeiture is brought pursuant to section 981(h), a criminal defendant who has a claim to the *res* will usually be within the district court's *in personam* jurisdiction. Thus, section 981(h) does give the district courts expanded power to resolve a criminal defendant's rights in a related *res* even though service cannot be effected because the property is outside the court's territorial jurisdiction. *See 11205 McPherson Lane*, 754 F. Supp. at 1484.

We realize that our result requires the government to file a second civil forfeiture action in the district court where the *res* is found if it wishes to affect any rights persons who are not subject to the territorial jurisdiction of the district court in which the related criminal prosecution is

pending may have in a related *res*. Having already defeated a criminal defendant who claims the *res*, this second filing is not likely to be necessary unless a lienholder or an innocent owner not present in the district where the criminal proceeding is pending files a claim.

C.

Unfortunately, our conclusion that section 981(h) does not allow extra-territorial service of process does not end our inquiry into the district court's power to adjudicate Friko's claim to ownership of the accounts that are the *res*. We must still consider whether the district court has otherwise obtained personal jurisdiction over Friko that would enable it to adjudicate Friko's rights in a *res* located outside the court's territorial jurisdiction. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Our review of this issue also is plenary. *See Bumberger*, 952 F.2d at 766.

The record before us does not show any contacts between the District of New Jersey and Friko beyond Friko's connection with the *Cardona* criminal prosecution and this case. However, in both the criminal prosecution and civil forfeiture proceeding, Friko waived any objection it may have had to the *in personam* jurisdiction of the District Court of New Jersey. Although the criminal summons issued against Friko could not properly be served on Friko in Panama, *see* Fed. R. Crim. P. 4(b) ("the summons may be served at any place within the jurisdiction of the United States"), Friko appeared in the *Cardona* prosecution pursuant to a corporate resolution signed by Daccarett (though Daccarett himself did not appear). Thus, Friko's

submission to the District Court of New Jersey's jurisdiction was voluntary.

Already litigating the criminal prosecution in the District Court of New Jersey, Friko voluntarily submitted itself to the *in personam* jurisdiction of the District Court of New Jersey for purposes of the civil forfeiture proceeding. Even assuming that Friko's appearance in the criminal action did not waive any *in personam* objection to the district court's jurisdiction in the civil forfeiture action, when Friko filed its claim of ownership to the *res* that is the subject of this forfeiture proceeding without objecting to the district court's *in personam* jurisdiction as well as its *in rem* jurisdiction, it waived its objection to the district court's inability to effect service of process beyond the court's territorial boundaries. *See Gottlieb v. Sandia American Corp.*, 452 F.2d 510, 515 (3d Cir.), *cert. denied*, 404 U.S. 938 (1971); *see also* 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3522, at 78 (2d ed. 1984) ("Jurisdiction over the person is a waivable defect, which must be asserted early in the action by the party who would take advantage of it."); *cf.* Fed. R. Civ. P. 12(h)(1) (describing steps to be taken to preserve defense of lack of *in personam* jurisdiction). Accordingly, we hold the district court had power to adjudicate the right to the accounts as between Friko and the government.

Because the district court lacked *in rem* jurisdiction, it did not, however, have the power to enter an adjudication determining that the government's right to the *res* was superior to all potential claimants. Such a determination of title in the *res* paramount to the whole world is

precisely the effect of the district court's May 24, 1991, order entering a default judgment in favor of the government on the forfeiture complaint. Therefore, that order must be vacated.

V.

Since the district court did have *in personam* jurisdiction over Friko, and thus could adjudicate ownership of the account as between Friko and the government, we are led at last to Friko's arguments on standing, the fugitive disentitlement doctrine and the district court's denial of its request for reargument.

A.

The district court held that Friko *qua* Friko lacked standing to challenge the forfeiture because it was merely a shell for Daccarett, a creature, as it were, without existence apart from the creator whose identity it masked. Friko's standing to contest the forfeiture is a question of law over which we exercise plenary review. *See United States v. 5000 Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991). Nevertheless, the district court's findings on the facts that underlie its legal conclusion as to standing cannot be set aside unless they are clearly erroneous. *See* Fed. R. Civ. P. 52(a); *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 647 F.2d 864, 866 (8th Cir. 1981), *cert. denied*, 454 U.S. 1184 (1982).

In forfeiture, as elsewhere, we must distinguish between standing conferred by statute and the standing requirements of Article III to the Constitution. Article III standing requires the claimant to show an interest in the property sufficient to create a "case or controversy," while

statutory standing requires claimants to comply with certain procedures. *See United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1262 (2d Cir. 1989). Friko maintains that it has fulfilled both the statutory and constitutional prerequisites for standing. It again relies on the Supplemental Rules and contends they provide the only statutory prerequisite for standing is the filing of a claim.[7] If so, when Friko filed its claim to obtain standing, it has complied with the only formality required.[8] Friko goes on to assert that it also has Article III standing because it holds legal title to the accounts.

The government does not dispute Friko's statutory standing under Supplemental Rule C(6). Thus, we are left with the question whether Friko had Article III standing.

The government concedes Friko's legal title but then questions its legal existence as an entity apart from Daccarett, as if Daccarett, masked and cloaked in the garments of Friko, had stolen, incognito, onto our shores. According to the government, it is Daccarett's standing that is in question, and the government contends that he has none because he is a fugitive whose access to court is precluded by the fugitive disentitlement doctrine.

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7. Supplemental Rule C(6) requires that "[t]he claimant of property that is the subject of an action in rem shall file a claim." Supp. R. C(6).

8. Even though this is not an admiralty or maritime claim, the Supplemental Rules apply to this action because the forfeiture statutes provide an action analogous to a maritime action *in rem*. *See supra* note 4.

Article III standing is commonly associated with an inquiry into injury-in-fact, causation, redressability and other prudential factors, *see, e.g., Warth v. Seldin*, 422 U.S. 490, 498-502 (1975), but the inquiry is more focused in forfeiture cases. Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it. *See United States v. $321,470.00 in United States Currency*, 874 F.2d 298, 303-04 (5th Cir. 1989) (ownership or possessory interest sufficient); *United States v. $122,043.00 in United States Currency*, 792 F.2d 1470, 1473 (9th Cir. 1986) (possession sufficient); *see also* Smith, *supra* at 9-57 & n.10.1 (discussing Article III standing of claimants). *But see United States v. $38,570.00 in United States Currency*, 950 F.2d 1108, 1112-13 (5th Cir. 1992) ("[T]he claimant must come forth with some evidence of his ownership interest in order to establish standing to contest a forfeiture [in a forfeiture under section 881(a)].") (emphasis omitted). We see little analytic difference between *Warth*'s approach and the owner-possessor approach in forfeiture cases. An owner or possessor of property that has been seized necessarily suffers an injury that can be redressed, at least in part, by return of the seized property.

B.

Though it is undisputed that Friko had legal title to the seized account, "courts have uniformly rejected standing claims put forward by nominal or straw owners. Thus, even possession or legal title to the *res* may be insufficient to establish standing to contest the forfeiture." Smith, *supra* at

¶ 9.04, at 9-58.6. Case law is in accord with the statement in Smith. In *United States v. One 1981 Datsun 280 ZX*, 563 F. Supp. 470 (E.D. Pa. 1983), the court disregarded a car's legal title and denied a father standing because it was his son who stood "to suffer from the Datsun's forfeiture." *Id.* at 475. The court relied on evidence that the car was referred to as the son's, that the son frequently drove the car but the father did not, that the car was "turbocharged and capable of great speed" but the father was 72 years old and suffered from a heart condition and that the father did not pay for the car. *Id.* Thus, though the car was kept at the father's house and the father held legal title to it, the district court held the father did not have standing to contest the forfeiture because the son exercised dominion and control over the car. *Id.* at 476.

In *One 1981 Datsun 280 ZX*, the court relied on *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27 (8th Cir. 1979) (*1945 Douglas I*), *appeal after remand*, 647 F.2d 864 (8th Cir. 1981) (*1945 Douglas II*), *cert. denied*, 454 U.S. 1143 (1982). There, the district court initially ordered forfeiture of an aircraft to the government. *1945 Douglas I*, 604 F.2d at 27. An intervenor who held legal title to the aircraft appealed. The government contested this intervenor's standing in the district court but that court did not decide the standing issue. The court of appeals then refused to reach the merits, holding that the standing question should be examined by the district court in the first instance. *Id.* at 29. Although the intervenor had tendered the money to purchase the aircraft, the court of appeals noted that an individual named Albert Kammerer (Kammerer)

had actually provided the funds. The record in the district court contained evidence tending to show that, on Kammerer's demand, the intervenor gave him a blank bill of sale for the aircraft. *Id.* It also showed that Kammerer considered himself the owner of the aircraft. *1945 Douglas II*, 647 F.2d at 866.

On remand, the district court held that Kammerer was the true "owner" of the *res*. *Id.* The court of appeals then affirmed on the merits because "[t]he evidence is consistent with Kammerer's dominion and control," *id.* at 867, and therefore the district court's conclusion was not clearly erroneous, *id.* at 866; *see also United States v. 526 Liscum Dr.*, 866 F.2d 213, 217 (6th Cir. 1988) ("[P]ossession of bare legal title by one who does not exercise dominion or control over property may be insufficient to establish standing to challenge a forfeiture.") (citing *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625, 630 (11th Cir. 1986) (emphasizing dominion and control in determining standing in a forfeiture case)).

In this case, the district court was faced with a subtly different issue. The government not only argued that Daccarett actually exercised dominion and control over the money in Friko's accounts, it also argued that Daccarett was, for all intents and purposes, Friko. That distinction does not change our analysis.

Once the government made out a *prima facie* case, Friko had the burden of establishing its independent power to control the accounts. *See $32,470.00 in United States Currency*, 874 F.2d at 302. The government's evidence persuaded the district court that the New York accounts in Friko's name were linked to money laundering. It

noted that Friko's directors were all members of Daccarett's family and that it was Daccarett himself who had authorized Friko to file its claim while he remained in Colombia, safe from prosecution. This evidence was enough to meet the government's initial burden and shift to Friko the burden of coming forward with some evidence to show that it had independent existence and could exercise dominion and control over the account independent of Daccarett. *See 528 Liscum Dr.*, 866 F.2d at 217.

Friko's efforts to rebut the government's evidence that Daccarett, not it, actually owned and controlled the accounts were feeble. It relied in large part on Jafri's affidavit describing the parallel market for dollars in Colombia and his assertion that Colombian businessmen customarily hold dollars in United States banks. Jafri's affidavit tells us nothing about Friko's identity *vis-á-vis* Daccarett; it only describes the practice of Colombian businessmen in transactions exchanging foreign currencies for dollars. Friko also offered the affidavit of accountant H. Charles Hess (Hess), to rebut the government's evidence on Friko's lack of existence apart from Daccarett. Hess merely attested to Friko's incorporation and the opening of the accounts in question. His affidavit said nothing about Friko or Daccarett's operations in the business world. Saad's affidavit, the final piece of evidence Friko submitted before entry of the order striking its claim, asserts only that Daccarett was in the textile business. Saad says nothing about Friko's business. Friko's documentary evidence verifies its formation as a corporation, its power to open the seized accounts and to litigate this claim, but it does not tend to

show that Friko itself conducts any kind of trade or business beyond holding legal title to various accounts, nor to establish Friko's existence independent of Daccarett.

If Friko had an independent existence, it should have presented evidence of legitimate business dealings in its own right. For example, if Friko were engaged in exchanging pesos for dollars in the parallel market, it should have been able to produce evidence of transactions with currency traders other than those the record shows as linked to the laundering of drug proceeds. Under the circumstances, the district court's finding that Friko was a straw owner of accounts owned and controlled by Daccarett was not clearly erroneous. Therefore, it did not err in entering the order of April 8, 1991, striking Friko's claim for lack of standing to contest the seizure.[9] Since that order was a final determination of Friko's rights in the *res*, Friko has forfeited to the government whatever rights it may have had in the accounts unless the district court erred in its order denying Friko's

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9. Once the district court determined Friko was a straw man for Daccarett, it applied the fugitive disentitlement doctrine since Daccarett had not appeared for his criminal proceeding. The district court declared he was a fugitive who could not challenge the forfeiture. On appeal, the parties continue to dispute the application of the fugitive disentitlement doctrine in the forfeiture context.

We do not need to reach this question because Daccarett has not filed a claim pursuant to Supplemental Rule C(6) and he therefore lacks statutory standing. However, even if we were presented with the issue, we believe the holding of the United States Court of Appeals for the Second Circuit that fugitive disentitlement does apply in forfeiture proceedings is persuasive. *See Eng*, 951 F.2d at 466-67.

motion for reargument. That question is the subject of Friko's appeal at our Docket No. 91-5768, to which we now turn.

VI.

To decide Friko's appeal at No. 91-5768, we again confront a threshold problem: the district court's power to adjudicate the motion for reargument. To answer that question we must determine whether the district court correctly treated Friko's motion for reargument as a Rule 59(e) motion for reconsideration of a final order. If so, it would be untimely under Rule 59(e) because it was filed over a month after the April 8 order. Friko contends that the district court erred in treating its motion for reargument as a Federal Rule of Civil Procedure 59(e) motion instead of a motion brought under either Federal Rule of Civil Procedure 55(c) or Federal Rule of Civil Procedure 60(b). If brought under Rule 55(c) or Rule 60(b), Friko's motion for reargument was timely and the district court should have exercised the discretion it has to decide whether to review the merits of Friko's motion. Friko argues its motion for reargument falls within the aegis of Rule 55(c) or 60(b) rather than 59(e) because it sought to submit new evidence on the standing issue and Rule 59(e) does not cover situations where a party seeks consideration of new evidence.

Unless we first determine the nature of the May 31 motion, we cannot decide how it was affected by the filing of the notice of appeal on the same day. Since this issue goes to the jurisdiction of the district court, our review is plenary. *See Bumberger*, 952 F.2d at 766-68.

In its May 31 motion for reargument, Friko cited only Rules 60(b) and 55(c). It asked the district court to vacate its final judgment that the *res* was forfeited to the government and allow the presentation of additional evidence set out in Rodriguez's affidavit. It said the district court should grant this relief because of the exceptional circumstances of the case, the large sum that it would lose if forfeiture were granted. It contends that Rodriguez's affidavit is new evidence and shows that Friko did have an independent existence as a closely held family business and was not a mere mask for Daccarett and that the delay in gathering this additional evidence was occasioned by problems in communicating with Friko's Spanish-speaking staff in Colombia.

While Friko sometimes referred to its motion as one for reconsideration (one more likely to fall under Rule 59(e)), it expressly relied on Rodriguez's affidavit as a reason why the judgment should be vacated. The character of a motion is determined by its function, not its title. *See, e.g., Keith v. Truck Stops Corp. of Am.*, 909 F.2d 743, 746 (3d Cir. 1990); *Venen v. Sweet*, 758 F.2d 117, 122 (3d Cir. 1985). The facts related in Rodriguez's affidavit indicate to us that Friko's motion was a Rule 60(b) motion. Rule 59(e) does not permit a party to present additional evidence as a basis for relief.[10] In addition, the district court had already

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10. Rule 60(b) reads, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered

entered a default judgment that the *res* was forfeited to the government before Friko filed its motion for reargument.[11] Even though Friko says it did not know of the entry of the default judgment at the time it filed the motion for reargument, we think the district court should have treated it as a Rule 60(b) motion because only Rule 60(b) allows a party to obtain relief from a default judgment. *See* Fed. R. Civ. P. 55(c) ("For good cause shown the court may set aside an entry of default and, *if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).*") (emphasis added). We hold that Friko's motion is a Rule 60(b) motion and therefore the district court erred in treating it as untimely under Rule 59(e).

Motions under Rule 60(b) "shall be made within a reasonable time, and for reasons (1) (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b); *see Hancock Indus. v. Schaeffer*, 811 F.2d 225, 239 (3d Cir. 1987). Friko's motion was made 53 days after the April 8 order. It was timely.

> in time to move for a new trial under Rule 59(b) . . . or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e).

11. Friko says he never received notice of the government's default motion or of entry of default. It thus assumed a default judgment had not yet been entered since Federal Rule of Civil Procedure 55(b)(2) requires notice of default motions to all parties who have appeared at least three days before a hearing on the motion.

The government argues, however, that Friko's notice of appeal at No. 91-5740, filed the same day as the motion for reargument, divested the district court of power to hear any motion other than a Rule 59(e) motion and therefore Friko's appeal at No. 91-5768 must be dismissed for lack of appellate jurisdiction since it was filed before the district court had ruled on it. The filing of a notice of appeal does not divest a district court of jurisdiction to *entertain* a Rule 60(b) motion. *See Main Line Fed. Savs. & Loan Assoc. v. Tri-Kell, Inc.*, 721 F.2d 904, 906 (3d Cir. 1983). The district court's failure to rule on the motion before an appeal is filed or thereafter either to deny the motion or signify its intent to grant it leaves nothing for a court of appeals to review with respect to the merits of the motion. Thus, the district court retained the power to deny it, *see Venen*, 758 F.2d at 123, or to notify Friko that it would, if given the power, grant the motion. In the latter case, Friko could have asked this Court to remand the case to the district court for the purpose of considering the motion, *see Main Line*, 721 F.2d at 906; *see also Hancock Indus.*, 811 F.2d at 239-40 (discussing *Venen* and *Main Line*). Because the district court incorrectly decided Friko's motion for reargument was an untimely Rule 59(e) motion, it neither denied Friko's motion nor signalled its intention to grant it. Friko's Rule 60(b) motion for reargument is thus still pending in the district court. We will therefore remand the case to the district court that it may exercise its discretion to either grant or deny Friko's motion for reargument.[12]

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12. The government argues on the merits that the evidence

VII.

In summary, on the appeal at Docket No. 91-5740, we hold that the district court had *in personam* jurisdiction over the dispute between Friko and the government and that venue was properly laid in the United States District Court for the District of New Jersey. We also hold that, on the record before it, when it entered its order striking Friko's claim, the district court did not err in deciding Friko had no standing to contest the forfeiture because it was a nominal party. In that appeal we will affirm the order of the district court striking Friko's claim and the order entering a default against Friko but, since the district court lacked *in rem* jurisdiction, we will vacate the May 24, 1991 order entering a default judgment in favor of the government. On the appeal docketed at No. 91-5768, we will, remand the case to the district court so that it can exercise the discretion it has on Friko's Rule 60(b) motion to reconsider its judgment against Friko in light of the additional evidence Friko claims it could not have assembled before the district court granted the government's motion to strike Friko's claim.

Friko wants to present is not newly discovered, merely newly presented. We do not reach that question and can express no view on whether the motion should be granted nor any view as to whether the motion meets the requirements of any of the subsections of Rule 60(b).

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5470 & 91-5768

UNITED STATES OF AMERICA

v.

CONTENTS OF ACCOUNTS NOS. 3034504504 AND 144-07143 AT MERRILL, LYNCH, PIERCE, FENNER AND SMITH, INC.

FRIKO CORPORATION,
Claimant

FRIKO CORPORATION,
Appellant

SUR PETITION FOR PANEL REHEARING

PRESENT: SLOVITER, *Chief Judge*, MANSMANN AND HUTCHINSON,
Circuit Judges

The petition for panel rehearing filed by Friko Corporation in the above captioned matter having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing he denied.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

Dated: September 22, 1992